

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENDALL TANKERSLEY,

Defendant.

No. 06-CR-60071-1-AA

August 3, 2007

Eugene, Oregon

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE ANN AIKEN

UNITED STATES DISTRICT COURT JUDGE

--

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Court Reporter  
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1 (Friday, August 3, 2007; 1:46 p.m.)

2 P R O C E E D I N G S

3 THE CLERK: This is the time set for Criminal  
4 06-60071, *United States of America versus Kendall*  
5 *Tankersley*, imposition of sentence.

6 THE COURT: Mr. Ray.

7 MR. RAY: Your Honor, there are two issues  
8 which the parties would like the court to address this  
9 afternoon.

10 First, of course, the propriety of the upward  
11 departure; and, second, an issue with regard to  
12 restitution, which has arisen since the previous  
13 hearing.

14 THE COURT: I wondered why I was given a  
15 preview of those documents, so, all right, let's hear  
16 what the problem is.

17 MR. RAY: First, with regard to the propriety  
18 of the upward departure, the court has granted in part  
19 the defendant's second amended motion for the limited  
20 purpose of allowing argument as to whether departure  
21 under 5K2.0 is warranted in this case.

22 The government submits that it is for the  
23 reasons that the court articulated during the previous  
24 sentencing hearing. The court exercised its --  
25 specifically, the court exercised its discretion under

1 5K2.0 to upwardly depart by 12 levels based upon its  
2 finding that the guidelines did not adequately take into  
3 consideration the defendant's intent to frighten,  
4 intimidate, and coerce private individuals at the time  
5 of the U.S. Forest Industries arson.

6 The court pointed out, in particular, the  
7 dramatic wording of the communique, and actually recited  
8 it in its entirety at the previous sentencing hearing.  
9 I won't do that. It is Government Exhibit 15, a copy of  
10 which I've provided to counsel once again and to the  
11 court, should either of you need to make reference to  
12 that.

13 The court also cited, as an aggravating factor,  
14 the fact that after the incendiary devices failed to  
15 ignite the first time, Ms. Tankersley and her  
16 codefendant went back to the scene and reset them.  
17 Based upon those factors, the court appropriately  
18 departed upward 12 levels.

19 Then, the court carefully considered all the  
20 3553(a) factors, which were fully presented at the  
21 previous hearing, granted the government's motion to  
22 depart downward four levels for substantial assistance,  
23 and then afforded Ms. Tankersley an additional one-level  
24 downward departure for her extraordinary cooperation  
25 with the government.

1           The court then imposed a sentence of 46 months,  
2           which was the right thing to do at that time and it  
3           still is.

4           The court could also reach this same  
5           disposition and obviate the upward departure issue by  
6           simply imposing the mandatory minimum 60 months and then  
7           departing downward 14 months or one level for the  
8           substantial assistance.

9           Second, the restitution issue: At the previous  
10          hearing on May 31st, the government provided the court  
11          with Government Exhibit 18, a copy of which I provided  
12          to counsel and to the court again, and indicated to the  
13          court that there were two victims that were deserving of  
14          restitution, National Union Fire Insurance Company and  
15          U.S.F.I. Holdings, together with the restitution figures  
16          that were owed to those entities.

17          Last week, I learned from Mark Noffke, the  
18          former chief financial officer with U.S. Forest  
19          Industries, that the information he had previously  
20          provided me was incorrect, and that the correct insurer  
21          for U.S. Forest Industries, instead of National Union  
22          Fire Insurance Company, was Zurich American Insurance  
23          Company. And that the correct restitution figure,  
24          instead of what I quoted to the court previously, was,  
25          in fact, \$883,615.99.

1 As documentation for this, I would offer what  
2 has been marked as Government Exhibit 20 for  
3 identification, a copy of which I've provided to  
4 counsel. This is a packet which contains an explanatory  
5 cover letter from George Shumsky, the counsel for Zurich  
6 American Insurance Company; an affidavit from a  
7 representative of Zurich; and copies of payments made by  
8 Zurich to U.S. Forest Industries, which total  
9 \$883,615.99.

10 I would ask the court to impose this  
11 restitution figure made payable and -- and make it  
12 payable to Zurich American Insurance Company. And to  
13 reimpose the \$100,000 figure for U.S.F.I. Holdings  
14 which --

15 THE COURT: Is a deductible.

16 MR. RAY: -- is the deductible, and U.S.F.I.  
17 Holdings was -- is in effect because U.S. Forest  
18 Industries is no longer in existence. Rendering a total  
19 restitution figure of \$983,615.99, which is slightly  
20 over \$6600 less than what we previously requested.

21 THE COURT: So what's the issue?

22 MR. RAY: I don't think there is an issue  
23 except that I needed to --

24 THE COURT: Oh, okay.

25 MR. RAY: -- advise the court of that. I don't

1 think Mr. Foreman has any problem with it.

2 THE COURT: Okay. I was wondering what was  
3 going to be the issue.

4 MR. FOREMAN: No issue.

5 THE COURT: Thank you.

6 MR. FOREMAN: Your Honor, on the last point  
7 with regard to the restitution issue, you should know  
8 that our representatives have actually already made  
9 contact, or attempted to make contact with the right  
10 person. And our hope is that we're going to make some  
11 progress on that front. And if and when we do, I'll be  
12 certain to let you know kind of what's going on, with  
13 regard to the restitution order. But it's -- to get the  
14 figures right and to get the payee right, certainly  
15 makes perfect sense to me.

16 THE COURT: Would you just update me, as I  
17 recall, in going back to read all of the documents, does  
18 that include the monies that had been held for her  
19 release as well as her house, and how is that piecing  
20 together? Are you taking all those resources then and  
21 negotiating with the -- for, like, a present value?

22 MR. FOREMAN: \$150,000 of the bond, I think the  
23 bond currently is \$250,000.

24 THE COURT: Right.

25 MR. FOREMAN: The first \$150,000 was actually

1 posted in Arizona.

2 THE COURT: Right.

3 MR. FOREMAN: And it had to do with liquidating  
4 a certain number of her assets and encumbering certain  
5 others, with the effect being that that money is, in  
6 fact, her money. That -- we assume that at the time  
7 that that bond is released, that that \$150,000 will be  
8 taken by the court and applied to whatever the  
9 outstanding restitution figure is.

10 And in terms of the order of it, we just leave  
11 that to the court. But that gives us a leg up on --  
12 against the total amount of the restitution figure.

13 We accept the numbers of the \$883,000 --  
14 actually, I guess \$983,000 as a total restitution  
15 figure, and assume that even if after the \$150,000 is  
16 paid, there will be a substantial amount yet due and  
17 owing, just with the simple arithmetic, which we do not  
18 quarrel with. We think the restitution order is  
19 mandatory, and that you have to enter it, and we're fine  
20 with that.

21 The remaining \$100,000 that was posted for her  
22 bond here actually came from her parents. And we would  
23 assume that since that was not money that Kendall ever  
24 had access to or ownership interest in, that at the  
25 appropriate time when the bond is released that



1 additional 100 would be returned to her family.

2 THE COURT: I would -- just as a matter of  
3 curiosity, I know in Mr. Paul's case, which I concluded  
4 this week, there was a negotiation on a civil context of  
5 that --

6 MR. FOREMAN: Yes.

7 THE COURT: -- restitution, and -- amount, and  
8 that, as such, has been completely satisfied. So you  
9 are telling me, what I'm hearing, is there are ongoing  
10 negotiations at the present time?

11 MR. FOREMAN: That's correct. Although, we  
12 have hopes, now that we have the right person and the  
13 right company, of engaging in a negotiation and  
14 presenting any result thereof to you for your approval.

15 THE COURT: (Nodding head.) And I appreciate,  
16 I see Mr. Ray is clearly moving on, but I sent out a  
17 written order so that we just didn't have to debate the  
18 issue, and just assume you are happy to proceed to  
19 discuss the merits of what we need to talk about today.

20 MR. FOREMAN: Happy to proceed.

21 THE COURT: Fine.

22 MR. FOREMAN: First of all, Your Honor, I do  
23 want to tell you that I do very much appreciate the  
24 opportunity to address you and to present some  
25 additional arguments on the point that is before us

1 today.

2 In assessing the propriety of the court's  
3 proposed upward departure, it seems to me that we need  
4 to start with an analysis otherwise of what happens in  
5 this case in connection with -- or what the guidelines  
6 would show for an arson, where the government has  
7 essentially agreed that the mandatory minimum -- the  
8 five-year mandatory minimum does not really apply in  
9 this case.

10 And without wanting to quibble too much about  
11 exactly that the words are, you're aware that the plea  
12 agreement in this case originally proposed that the  
13 government would recommend to the court a sentence of  
14 51 months, which was below the 60-month mandatory  
15 minimum. And, indeed, in that case -- in this case, as  
16 well as in other cases where there have been similar  
17 plea agreements, it has been your exercise of discretion  
18 to allow further reductions in that.

19 We think that as a starting point, as a matter  
20 of law, that once the plea agreement says that the  
21 government will recommend to the court that any sentence  
22 that be imposed is less than the mandatory minimum, that  
23 the court essentially has opened up its discretion and  
24 can do certain things within its sound discretion.

25 And that's different from some of the plea

1 agreements, because I know there is at least one where  
2 it was essentially a fixed number that the government  
3 and the defendant agreed to. And I think it was 37  
4 months. And the stipulation in that case was that the  
5 defendant was not allowed to argue below that number.

6 That's not the stipulation in this case. When  
7 we agreed that the government's recommendation would be  
8 in the area of 51 months, it was with the clear  
9 understanding that the defendant was free to argue that  
10 the appropriate sentence should be a number less than  
11 that. And, indeed, we think that's what the court not  
12 only has presumptively done, but would need to do under  
13 the circumstances.

14 But in any event, just looking at a starting  
15 point for this analysis in terms of the impact of the  
16 proposed upward departure on the sentence in this case,  
17 I think it's instructive to go back and take a look at  
18 what the offense would look like in a guideline  
19 sentence, assuming that the mandatory minimum was not  
20 controlling, and assuming that we haven't gotten to the  
21 issue yet of an upward departure under 5K2.0.

22 And when we put in our paperwork before, and we  
23 submitted our objections to the Probation Department,  
24 and did a kind of alternative calculation at that point,  
25 and I'm not going to go through all of it, because,

1 frankly, it's all there in the record and you can see  
2 it, but the bottom is that we suggested, in our papers,  
3 that the appropriate guideline sentence under these  
4 circumstances had a range of from 15 to 21 months.

5 Now, in fairness, that involved an assumption  
6 on our part that we would receive four downward level  
7 departures for a -- the role in the offense. And I  
8 sometimes get confused about which is minimal and which  
9 is minor, but one of them is two and one of them is  
10 four. And we had urged, and the government had  
11 recommended, that it be a four-level downward departure.

12 The Probation Department had taken the position  
13 that only two was appropriate. And, in fact, that was  
14 what the court did in this case. It suggested that a  
15 two-level downward adjustment for role in the offense  
16 was the appropriate adjustment to make under those  
17 circumstances. We're not revisiting that.

18 All I wanted to sort of say was that even under  
19 the circumstances where my calculations, as originally  
20 presented, were wrong, and only a two-level downward  
21 adjustment for role in the offense were allowed, the  
22 presumptive guideline range under those circumstances  
23 would have calculated out to be 24 to 30 months.

24 And it's my argument to you today, as a  
25 starting point for assessing the propriety of the upward

1 departure, that that's the heartland of sentences under  
2 circumstances that we're dealing with.

3 We've looked at all the factors that are part  
4 of the overall sentencing guideline, and -- looking at  
5 all of them, and in the absence of the proposed upward  
6 adjustment, the heartland for an arson case involving  
7 this loss with this role in the offense is, in fact, 24  
8 to 30 months.

9 So the key is there for 5K2.0, which we knew it  
10 would be before we got here today. And I would suggest  
11 that unless you utilize an upward adjustment, an  
12 appropriate sentence has to be in the 24 to 30 months  
13 range.

14 Now, the justification for the proposed upward  
15 adjustment, my recollection is the primary focus was on  
16 the communique that was issued. I think Mr. Ray is  
17 right in the sense that you certainly in your sentencing  
18 comments noted that Ms. Tankersley had gone and  
19 attempted to set a fire, and a few days later had gone  
20 back and set, in fact, a fire.

21 I would submit, however, that that's not really  
22 the controlling issue, because she pled guilty to both  
23 those crimes as separate offenses and has received --  
24 and will receive separate punishments for both of those  
25 separate offenses.

1           So the way that I understand the guidelines  
2 work is that once we sort of calculate what the relevant  
3 conduct is, which includes all of the offenses,  
4 certainly, to which she's entered pleas of guilty, that  
5 becomes the basis for the guidelines calculation. And  
6 my contention is that the heartland, including all of  
7 those offenses, is within the range I've previously  
8 indicated.

9           So what we're really talking about, I think, is  
10 the communication -- or the communique that was issued  
11 in the aftermath of these events. And just in passing,  
12 I would note that in this case, I don't think there is  
13 any evidence of a substantial note that the communique  
14 had the type of impact on anybody relevant to this case  
15 that is kind of suggested. I mean, I -- I'll come back  
16 to this, but my assessment of Mr. Bramwell's testimony,  
17 who I listened to quite attentively, was that he and his  
18 company actually took these events in stride, and that  
19 there was minimal psychological impact, actual  
20 psychological impact on them, or adverse impact upon  
21 their business other than the losses caused by the arson  
22 itself.

23           Now, I'll come back to that because I think it  
24 bears on it, but in connection with the determination to  
25 impose an upward departure in relationship to the



1     communique, I will notice -- note that there were two  
2     other defendants who are at least relevant to talk about  
3     in connection with the upward departure. One of them  
4     was Mr. Tubbs.

5             Mr. Tubbs, it is my recollection, received a  
6     one-level upward departure for his role in offenses  
7     including U.S. Forest Industries.

8             THE COURT: I have a lot to say that I will  
9     pick up from my earlier sentencing that will best  
10    articulate exactly what I did in conjunction to this  
11    case, because it's a different set of calculations, but  
12    addressing the -- in the context of across-the-board all  
13    10 of them, how I had to address certain groupings in  
14    doing the calculations, so I'll be talking about that,  
15    so I --

16            MR. FOREMAN: I'm not going to belabor it.

17            THE COURT: Good.

18            MR. FOREMAN: I mean, I've certainly read your  
19    earlier remarks in connection with other sentencing  
20    hearings. I kind of know where you are coming from.  
21    And I do understand that in Mr. Tubbs' situation, just  
22    by way of example, the fact that you had found the  
23    terrorism enhancement applicable in numerous other  
24    counts had something to do with what you did in  
25    connection with this particular upward adjustment for

1 U.S. Forest Industries.

2 But I'd be remiss if I didn't point out that in  
3 his circumstances that the upward adjustment, in fact,  
4 as it appears of record, it was but one level. And the  
5 other one that I think is -- and this one is a little --  
6 I confess -- a little hazy to me, it has to do with  
7 Mr. Thurston.

8 Mr. Thurston, as I understand it, received a  
9 fixed sentence of 37 months. And although there may  
10 have been some upward adjustments, my recollection is  
11 that the subject of the communique in connection with  
12 U.S. Forest Industries was not cited to the court as a  
13 basis for anything in connection with his sentencing.  
14 And I only mention that, again, in passing because if,  
15 in fact, we are dealing with the -- that circumstance,  
16 that communique, and the government had put in its  
17 paperwork that it submitted in a sentencing memorandum  
18 that he, too, had been involved in the U.S. Forest  
19 Industries, I mean, I understand that he pled guilty to  
20 a different substantive offense. Having said that, it  
21 would seem to me that his involvement in this  
22 communique, as well as several others, which I  
23 understand he was involved in over the course of a  
24 relatively extended period of time, would certainly have  
25 some effect upon how one evaluated, at a minimum, the



1 conspiracy count, which he also entered a plea of guilty  
2 to.

3 I accept the fact he didn't plead guilty to  
4 U.S. Forest Industries. Hard to argue that his  
5 involvement in communiques in a variety of different  
6 contexts aren't acts in furtherance of his  
7 conspiratorial efforts, and, therefore, would be  
8 relevant in looking at his circumstances, it seems to  
9 me.

10 And I guess the reason that I think it's  
11 important that I make reference to it, Your Honor, is  
12 that one of the clear objections of the sentencing  
13 provisions and 3553, in particular, is to treat  
14 similarly situated people similarly. And I am -- I  
15 submit to you that under the circumstances before you,  
16 it seems unjustifiable to impose a 12-level upward  
17 adjustment on Ms. Tankersley for her vicarious  
18 involvement in the communique that issued, and not to  
19 talk about that at all, and not to impose a similar  
20 adjustment on Mr. Thurston for what appears to be a  
21 similar role.

22 THE COURT: I'm going to interrupt you, because  
23 I'm going to -- this is by way of comment and a question  
24 that I'll ask of the government, and I -- as just a  
25 point of reference. As you all know, and everybody has

1     tried to argue that collectively the entire group of  
2     ten, and then individually work within that context.  
3     There are negotiations in each and every case. People  
4     picked and selected the crimes to which they are going  
5     to plead guilty to. There was a vast array of  
6     negotiations that took place. And in the context of  
7     those negotiations, the court agreed and accepted those  
8     pleas.

9             And then we have the exercise of applying the  
10    guidelines, with constraints and agreements, distinct  
11    and yet somewhat similar and somewhat different in each  
12    case.

13            And Mr. Thurston does come in as -- sort of at  
14    a different angle. I've noted that throughout. And  
15    that's a question I'm going to have to ask the  
16    government, because it's not similar, and yet it's a  
17    concern to the court that we address that, or that the  
18    government put on the record why it is appropriate in  
19    the context of this particular sentencing. But it's  
20    sort of, again, people want to have the benefits of the  
21    plea agreement, and then want to argue sort of a  
22    different calculation, forgetting that the court does  
23    have a discretion with 3553 categories.

24            So I'm happy if you continue to argue those  
25    calculations, but it's probably more helpful if you look

1 at how to, on the broader scale, address the individual  
2 differences under 3553 categories.

3 MR. FOREMAN: Fair enough, Your Honor. And,  
4 again, I don't -- I have the benefit, of course, now of  
5 having had the opportunity to read some of your remarks  
6 in connection with the other sentencings. And I am not  
7 working on a blank slate here.

8 THE COURT: I know that.

9 MR. FOREMAN: And I'm just trying to, as best I  
10 can, bring points to your attention for your  
11 consideration that I think are at least relevant in  
12 assessing --

13 THE COURT: No, I've thought about --

14 MR. FOREMAN: -- these points.

15 THE COURT: -- them inside out, and upside --

16 MR. FOREMAN: Okay.

17 THE COURT: -- down. And, again, one of the  
18 things I would tell you is because this case wasn't  
19 tried, there are lots of facts that both you and Mr. Ray  
20 and both teams know about that I don't know about. And  
21 there were some -- I would say in the context of  
22 negotiations, there were some professional decisions  
23 made about which issues were stronger or which sets of  
24 evidence compelling or not compelling. And people made  
25 those decisions.

1           So it's always a challenge for a sentencing  
2 court when you individually know more about all those  
3 factors and how to look at them, and we're given what  
4 we're given to make some decisions.

5           So -- and, again, in the context of the federal  
6 process, looking behind those agreements or arguing  
7 outside the document that you entered into, tends to get  
8 sideways with the Ninth Circuit, and so I'm careful  
9 about how we even discuss some of this.

10           MR. FOREMAN: And I'm -- I don't want anything  
11 I say to suggest that we're repudiating the plea  
12 agreement. I mean, the plea agreement was, in fact,  
13 negotiated and it was entered into. And there were a  
14 couple of assumptions that were part of what we were  
15 doing in that. And one of them, an assumption, was that  
16 the -- that the government intended to argue that the  
17 terrorism enhancement was applicable to my client, for  
18 example. But it didn't know that. And it didn't ask  
19 that we stipulate to that. It was going to make that  
20 argument to you for your assessment. And, in fact, that  
21 happened in this case.

22           And the other part of it that I think is  
23 relevant --

24           THE COURT: And they had their alternative  
25 argument as well.

1 MR. FOREMAN: They did have an alternative  
2 argument. But if I look at the plea agreement and  
3 select for myself -- if I am allowed to cherry-pick it a  
4 little bit, the --

5 THE COURT: That's exactly what has been going  
6 on. And I appreciate your calling it for what it is,  
7 because that's exactly how people approach the  
8 sentencings, as well they should. And that's just fine  
9 to argue their strengths. But at the same time, I'm  
10 just, in the bigger picture, I'm looking at mathematical  
11 calculations. And Mr. Ray is giving two frameworks to  
12 walk through that analysis to get to the number that  
13 he's recommended the court impose. And I appreciate  
14 your having another way of looking at it.

15 But, again, that's one structure that the court  
16 is going to look at. The other is that plea agreement.  
17 And then, finally, the discretion the courts are  
18 afforded under 3553.

19 MR. FOREMAN: Exactly. I think we're on the  
20 same wavelength --

21 THE COURT: Good.

22 MR. FOREMAN: -- on this. And my only comment,  
23 then I'll move on, is that it was clear to me, and I  
24 think the letter of the plea agreement is there for your  
25 inspection, that the government intended to recommend

1 that the appropriate sentence be 51 months. And no  
2 matter how they got there, whether you applied the  
3 terrorism enhancement and then they got 15 levels or  
4 however many it was as a downward departure under 5K1.1,  
5 or whether or not they got there another way, they  
6 intended to recommend 51 months to the court.

7 My only point is that that's the plea  
8 agreement. And the other part of the plea agreement is  
9 that we were free to argue to the court why something  
10 less than 51 months was the appropriate sentence in the  
11 case without doing violence to the plea agreement.

12 THE COURT: And you did, and I -- and so in  
13 listening, imposed a lesser term than was requested by  
14 the government. So that's where we were when we left  
15 last, so --

16 MR. FOREMAN: So now let me turn my attention  
17 to some legal arguments as to why the proposed upward  
18 departure should not be imposed in this particular case.  
19 And if I may, Your Honor, I'm going to make reference to  
20 a few cases, and I've taken the liberty to just make a  
21 set for you.

22 THE COURT: Perfect.

23 MR. FOREMAN: And I've already provided those  
24 to Mr. Ray. And they are kind of in an order according  
25 to how I anticipate referring to them today, not that I

1 expect you to digest them necessarily on the spot.

2 I guess I would start with the idea that when  
3 we went back in -- following our hearing on May 31st and  
4 started taking a look at 5K2.0, and I'm drawing now a  
5 quote from the commentary under the background section  
6 of that, I offer this: Departures were never intended  
7 to permit sentencing courts to substitute their policy  
8 judgments for those of Congress and the Sentencing  
9 Commission, direct quote out of the commentary.

10 And I do submit --

11 THE COURT: I have to -- I'm just going to tell  
12 you, one of the things I am -- I am just a bit concerned  
13 about at the moment is I think you handed me eight  
14 cases, which -- some of which are familiar to me. And  
15 everybody has known we've had this date set for some  
16 period of time, like, many weeks. And I waited,  
17 anticipating additional memos, which I think I have  
18 something from the government, as I recall. And I went  
19 back through all my original materials, but I would have  
20 appreciated the courtesy if you have legal arguments  
21 that you are going to be making in references to cases,  
22 not only that I would have the chance to take a look at  
23 it ahead of time and come in here with my summaries of  
24 the cases, but also that the government be prepared to  
25 respond with your -- to the cases.



1 MR. FOREMAN: I certainly meant no disrespect  
2 to either you or the government.

3 THE COURT: I know that. I'm not -- I'm just  
4 saying that if your goal is to get a sentencing done  
5 today, you might not be getting it because I don't --  
6 I've taken as much time as I've needed, and tried to be  
7 prepared when we came in to do the work and be done, and  
8 kind of get finality. But when I don't feel that I'm  
9 perfectly prepared and have looked all around at all the  
10 cases, and the other side has not had a fair chance to  
11 go back and say, these three cases are totally off  
12 point, and here is what we argue, and here is something  
13 else you should look at, particularly in the context of  
14 something as important as this, the people who I can  
15 tell are here from distances because we've been here  
16 before, will have to return, because I am not going to  
17 go forward on something that is as important as this  
18 without giving the other side a chance to look at the  
19 cases and respond, nor really feel fully prepared to  
20 make a decision. If you want me to do something  
21 different, work me -- or if you're just bypassing me and  
22 making your record for the Ninth Circuit, which is fine,  
23 but if you wanted to be persuasive today, I would have  
24 appreciated something in writing.

25 MR. FOREMAN: Again, my apologies for the



1 oversight. And, obviously, both you and the government  
2 need to be comfortable that you've made -- you're  
3 adequately prepared, and I apologize.

4 THE COURT: It's not as if we haven't had a  
5 minimum amount of paper filed by everybody in this case.  
6 I don't necessarily need more. But if you were going to  
7 hand me eight cases today, it would tell me that you've  
8 read them, and thought about them, and you had a theory,  
9 that you might have put it in writing to give us a heads  
10 up, in fairness, so that people could be prepared.

11 MR. FOREMAN: Understood, Your Honor.

12 THE COURT: So how do we want to proceed? Why  
13 don't you talk with Mr. Ray and your local counsel, and  
14 Mr. Engdall and just have a discussion about where we're  
15 headed.

16 MR. FOREMAN: Okay.

17 THE COURT: I'm just going to step off the  
18 bench.

19 (Recess: 2:17 until 3:26 p.m.)

20 THE COURT: I would note we've taken, gosh,  
21 what, an hour? Is that a fair summary of time? And  
22 Mr. Ray, you and Mr. Engdall, have read the cases that  
23 have been provided, is that correct, and had a chance to  
24 talk with counsel?

25 MR. RAY: Yes, Your Honor.

1 THE COURT: And are you prepared to proceed?

2 MR. RAY: We are.

3 THE COURT: And I have, as well, gone through  
4 the cases and read -- I think there is really only one  
5 I'm not really familiar with, is that fair? I mean,  
6 that's my reading of looking through everything. And I  
7 read the one I hadn't seen before.

8 MR. FOREMAN: Your Honor, first of all, my  
9 apologies again to Mr. Engdall and Mr. Ray and to the  
10 court for this delay.

11 I think the Seventh Circuit case is the only  
12 one that -- I will cite to some others but, frankly, I  
13 don't think they stand for anything approaching a novel  
14 premise of law. They simply stand for, hopefully,  
15 support for the argument that I'm advancing to you, but  
16 there is nothing new in them.

17 THE COURT: Okay. Yeah, but it was important  
18 to take the time to read the case.

19 MR. FOREMAN: I agree.

20 THE COURT: Thank you.

21 MR. FOREMAN: I agree. Picking up, Your Honor,  
22 where I was, and the argument that I want to make about  
23 the inapplicability of the upward departure that the  
24 court proposes to do has two kind of pieces to it. One  
25 of them is that, as I indicated, I don't think it should

1 be applied at all. And the second part, of which I  
2 hadn't gotten to yet, is that if it is to be applied, I  
3 don't think it should be applied in as dramatic a  
4 fashion in terms of how much you apply it, as you have  
5 proposed to do.

6 I had cited to a section out of the commentary,  
7 out of the background commentary to Section 5K2.0. And,  
8 basically -- it basically said -- and this is a quote,  
9 departures were never intended to permit sentencing  
10 courts to substitute their policy judgments for those of  
11 the Congress and the Sentencing Commission.

12 And the -- it is my submission, Your Honor,  
13 that that's what the proposed departure does, is it  
14 suggests that there is a basis for an upward departure  
15 that I am not here to argue against.

16 I think the court correctly found that the  
17 proposed terrorism enhancement to this defendant and  
18 these events didn't apply under 3A1.4. But I do know  
19 that you have made statements in other sentencings, and  
20 I, frankly, think in ours, too, to the effect that you  
21 didn't see -- necessarily think that using intimidation  
22 or arson as a tool to target private companies should  
23 necessarily be treated much differently than if it  
24 had -- were the government that were involved.

25 My view is that both the Congress and the

1 Sentencing Commission had expressly passed upon which  
2 kind of defendants -- which defendants should receive a  
3 terrorism enhancement and, importantly, which should  
4 not. And when they specifically defined -- when  
5 Congress specifically defined a federal crime of  
6 terrorism, and then directed the Sentencing Commission  
7 to amend the guidelines to include those which  
8 qualified, it was a congressional directive to the  
9 effect that it should exclude those that did not meet  
10 the federal crime of terrorism. And to the degree that  
11 they excluded people whose objective was to intimidate  
12 private citizens, I submit that this court should not  
13 use its own judgment to, in essence, step in place of  
14 that congressional determination.

15 I was going to suggest that that may be a,  
16 quote, forbidden ground within the meaning of the case  
17 law. Frankly, I think that's stepping too far with the  
18 way I read the cases. I think a forbidden ground are  
19 things that are expressly identified as being improper  
20 for departures in the sentencing guidelines, so for  
21 instance --

22 THE COURT: I'm going to suggest that our --  
23 the government will argue their position, but I've  
24 looked at this and looked at this and looked at this,  
25 but in the context of this particular conspiracy, under

1 the whole broad approach to what the intents, the  
2 motives, and the goals of the conspiracy were, that they  
3 used direct means against government and indirect means  
4 through the private sector to achieve the same goals.  
5 And that's -- in many respects, it's -- it would be --  
6 and that's what I've stated in my sentencings, unfair to  
7 deviate wildly in the sentencings when the overall and  
8 overarching goals of the conspiracy, the intent,  
9 purpose, and design, and effect, were more direct --  
10 directly against government and indirectly with the same  
11 goals against the private sector.

12 And I am -- I don't think it's in the forbidden  
13 grounds. I think -- I appreciate the Seventh Circuit's  
14 approach, but I'm going to tell you that I have made  
15 this as a fundamental ruling in these cases.

16 I do appreciate your argument. And I'm happy  
17 to hear things further, but in the context of how I  
18 looked at this, you need to talk about that, because  
19 it's just -- it's the elephant in the room.

20 MR. FOREMAN: And, you know, I do understand,  
21 Your Honor, that if you were to look at the conspiracy  
22 or the conspirators as a group or as a whole, I mean,  
23 one could fairly state that as set forth in the  
24 conspiracy count, what they had in their minds  
25 collectively was to influence somebody. I appreciate

1 the point.

2 THE COURT: Uh-huh.

3 MR. FOREMAN: Now, I suggest, however, that the  
4 distinction that the law recognizes is that when you  
5 carve back and you try to analyze what a particular  
6 defendant did, you -- they are not necessarily charged  
7 with all the actions of their coconspirators. They are  
8 charged with those that occurred while they were part of  
9 the conspiracy, and perhaps those in which they  
10 otherwise indicated that they had some sort of approval.

11 In Ms. Tankersley's case, she was part of the  
12 conspiracy for a relatively short period of time. And  
13 the only actions that she personally engaged in,  
14 regardless of anybody else, were actions that involved  
15 private industry.

16 By 1999, she had left and she had departed the  
17 venue. She was in northern California and later in  
18 Arizona. And as a practical matter, I don't think the  
19 law allows you to infer that she had an objective that  
20 somebody else may have had before she joined the  
21 conspiracy or that somebody else may have had after she  
22 left.

23 And so in a peculiar sense, I think that on  
24 some level, the law requires a distinction be drawn  
25 between those people whose crimes, whose participation,

1 whose personal activities in furtherance of the  
2 conspiracy, support a terrorism enhancement from those  
3 who do not. It's the position that I'm urging here  
4 today, and I know it's different from the position that  
5 you've taken, but I would be --

6 THE COURT: I'm happy to have you make it,  
7 that's fine.

8 MR. FOREMAN: Well, I don't want to just beat a  
9 dead horse here. And I do understand -- I've read your  
10 thinking, Your Honor, and I'm not --

11 THE COURT: Well, have you read the opinion we  
12 handed out initially to give guidance in this particular  
13 case?

14 MR. FOREMAN: The one having to do with the  
15 terrorism enhancement?

16 THE COURT: Right.

17 MR. FOREMAN: Of course. Cover to cover. And  
18 all I'm saying is that when I go back and I do the  
19 research that sort of talks about how sentences are to  
20 be tailored in one case or another, I say that the  
21 terrorism enhancement has meaning. And for those people  
22 who qualify for the terrorism enhancement, I'm not  
23 quarreling with what the court did. You found that we  
24 don't.

25 THE COURT: Right.



1 MR. FOREMAN: And because of that fact, I think  
2 it leaves open the idea of whether or not it's  
3 appropriate for this court to get to much the same place  
4 a different way.

5 And without previewing the Seventh Circuit  
6 decision, you can anticipate my argument is going to be  
7 that you shouldn't, because you are either in or you are  
8 out. And in this situation, my position is that if you  
9 are not involved in a federal crime of terrorism, then  
10 you have to look at arson. And you have to look at the  
11 heartland of cases for arson. And then you have to  
12 decide whether or not there is a basis for an upward  
13 departure that doesn't amount to substituting the  
14 court's judgment for the Sentencing Commission or the  
15 Congress in defining who should be there, or whether or  
16 not it's appropriate for you to get there through a back  
17 door.

18 And the argument that I'm here to try to  
19 advance to you today, hopefully, is that under the  
20 circumstances of the case law as it exists today, that  
21 my argument is the correct one, and that she isn't  
22 subject to the enhancement at all.

23 I would also just kind of point out that one of  
24 the things that you commented on in terms of the import  
25 of the -- of the communique, and I am mostly focusing on



1 the communique in this case, is that the Ninth Circuit  
2 has held that upward departure should not be based on a  
3 perceived harm that is either speculative or unduly  
4 attenuated.

5 Now, in this case, the evidence that's before  
6 you in this particular sentencing has to do with  
7 Mr. Bramwell's reaction, among other things, to the  
8 arson that occurred in front of him. And I have cited  
9 to you a case, the *Dayea* case, which I'm sure you're  
10 familiar with, for the proposition that there are  
11 circumstances where the perceived harm justifying an  
12 upward departure is too remote or too speculative.

13 And in that situation, there was a suggestion  
14 that the death of a particular police officer had an  
15 impact upon other police officers in the performance of  
16 their professional functions. And I just point out that  
17 on that one that it was -- that decision was reversed.

18 Now, let me just turn away from the per se  
19 application of the upward enhancement and talk a little  
20 bit about the scope of the upward enhancement. Twelve  
21 levels is what the court has proposed to do in this  
22 particular case. And I would submit that that is a  
23 dramatic -- would have a dramatic impact upon the  
24 sentence in this case, and that it is too much, even if  
25 one accepts the fact that the court has the authority to

1 impose some sort of an upward departure. And I've cited  
2 to the *Roston* case, which sort of stands for the  
3 proposition that at seven levels you got to look very  
4 carefully before you can use it. And, you know, I've  
5 tried to find a way to frame this that is, hopefully,  
6 intellectually honest.

7           The -- I thought of trying to sort of take a  
8 look at what the court did and said, well, what happens  
9 if you just subtract 12 levels out of that? I suggested  
10 that in my papers, and then in my later papers, I kind  
11 of said, ah, I'm not so sure about that. And what that  
12 would do is it would have the impact, if you did it, of  
13 reducing the sentencing range from something to -- a  
14 level of 8 to 14 months, it'd become a Class C offense.  
15 And the difficulty with that approach, by my lights, is  
16 that it would -- it requires that the government's  
17 concession as to a 5K1.1 reduction stand, and then you  
18 subtract 12 levels off, and you get to a point where I'm  
19 not sure that I can pass the straight-face test in terms  
20 of that kind of argument. So I go back --

21           THE COURT: It's been tried as well.

22           MR. FOREMAN: But not by me.

23           THE COURT: No, it hasn't.

24           MR. FOREMAN: Okay. But the -- but I think the  
25 place where I come back to, where I'm more comfortable,

1 and I think is a more principled place, is if you start  
2 with the premise that we try to figure out what the  
3 appropriate guideline calculation is for an arson --

4 THE COURT: Well, let's talk about Mr. Ray's  
5 alternative, starting with a minimum mandatory 60 months  
6 and going down from there.

7 MR. FOREMAN: I don't think it matters, because  
8 once the government makes a recommendation that says the  
9 mandatory minimum is not to be binding upon the court,  
10 and regardless of whether you start at 60 or whether you  
11 start at -- I don't even remember the number -- 78 maybe  
12 it was, under the other analysis, once the government  
13 concedes that the mandatory minimum is no longer  
14 binding, and shouldn't -- and that a sentence should be  
15 imposed below the mandatory minimum, that this court has  
16 the authority to decide what the appropriate sentence  
17 should be that meets the factors under 3553.

18 And so even if he wanted to start at the 60 and  
19 immediately says that from the 60 we're going to take  
20 off, I guess it would be two levels, in order to get to  
21 51 months, the bottom line is he has recommended to the  
22 court a sentence below the mandatory minimum, and we  
23 don't have to talk about it anymore.

24 THE COURT: Right. Which he did in conjunction  
25 with the plea agreement that he entered into that gave

1 the court that recommendation.

2 MR. FOREMAN: Yes.

3 THE COURT: Right. And that the court departed  
4 further.

5 MR. FOREMAN: Yes. Which the court I believe  
6 had the authority to do. But the point that I'm trying  
7 to make is that with the mandatory minimum no longer  
8 defining the court's floor, then I think the appropriate  
9 analysis is to go back and do a sentencing guideline  
10 calculation, without regard to it. And that's what the  
11 Probation Department did, before we got to the 12-level  
12 issue, and before we got to the 5K1.1 issue.

13 Essentially what it did is it calculated it on the basis  
14 of the total offense conduct, in terms of picking up the  
15 relevant conduct and the total loss, it added more than  
16 minimal planning, it subtracted acceptance of  
17 responsibility, it gave a two-point reduction, not a  
18 four-point reduction, for role in the offense, and that  
19 becomes the baseline calculation that I think is  
20 appropriate. And that's what I'm arguing for.

21 And so if you start with the idea that you were  
22 going to do some sort of upward enhancement, I think you  
23 start --

24 THE COURT: And that was presumptive 24 to  
25 30 months?

1 MR. FOREMAN: Yes, exactly. And that becomes  
2 what I urge the court to find is the heartland of cases  
3 of arson in which we're not dealing with a mandatory  
4 minimum.

5 And so if that analysis is correct, then I'm  
6 saying that that -- that if you -- that's the point that  
7 you work off in terms of trying to figure out what the  
8 appropriate case is.

9 I'm not going to talk about the *Leahy* case,  
10 because you can sort of see it standing there for a  
11 proposition that's obviously favorable to us, which  
12 suggests, by analogy, that if there is an attempt to  
13 suggest that there be an enhancement under another  
14 provision that is intended to get you close to a  
15 terrorism enhancement, you can't do it because the  
16 offense doesn't qualify. And I submit that that's where  
17 we're at here.

18 So what can you do? Well, I've tried to look  
19 at the case law, and the ones that I've sort of cited to  
20 you, and there is certainly a lot of them, I think that  
21 the Ninth Circuit seems to allow two- to four-level  
22 upward adjustment without even blinking, is the sense  
23 that I've got of it.

24 Anything above that is a little different. In  
25 the *Nagra* case that I presented you with, I'm sure you

1 are familiar, they reversed on a six-level upward.  
2 They, actually, in the *Matthews* case reversed on a four  
3 level, although there are cases that uphold the four  
4 level.

5 THE COURT: So do the calculations for me. Say  
6 you take the presumptive sentencing range as the  
7 calculation was made, 24 to 30 months, and you add two  
8 levels, what's the range?

9 MR. FOREMAN: Well, I don't have it in front of  
10 me. My --

11 THE COURT: Well, take a minute and ask  
12 Mr. Walker or find out and tell me what it is.

13 MR. FOREMAN: Okay. Do you have the book?  
14 Thirty to thirty-seven.

15 THE COURT: For a two level.

16 MR. FOREMAN: For the two level.

17 THE COURT: What's the four level?

18 MR. FOREMAN: Thirty-seven to forty-six.

19 THE COURT: Thirty-seven to forty-six. And a  
20 two level is what again, 31 to --

21 MR. FOREMAN: Thirty to --

22 THE COURT: Thirty to thirty-six. Okay. Which  
23 I would point out, I imposed a 46-month sentence.

24 MR. FOREMAN: I do know that, Your Honor.  
25 And -- I mean -- but the problem that we're starting

1 with is you get to a 46-month sentence only because the  
2 government starts at a number that is extraordinarily  
3 high and irrelevant.

4 THE COURT: What number do they start at?

5 MR. FOREMAN: Fifty-one. That's their  
6 recommendation coming in. And it seems to me that the  
7 appropriate thing to do is you have to start with the  
8 idea that the 5K1.1 assistance, which they have  
9 stipulated as part of the plea bargain, it means  
10 something. All I'm saying to you is that I thought it  
11 was unfair of me to make an argument that started with  
12 where they started and then required you to subtract 12  
13 levels out. It just didn't strike me as being  
14 intellectually honest. So I can say, forget all of  
15 that, and instead go to the heartland of sentences for  
16 arson, and impose a sentence within 24 to 30 months.  
17 That is the heartland of what I submit should be the  
18 appropriate sentence in this case.

19 At the end of the day, we go back to 3553. At  
20 the end of the day, you took the government's  
21 recommendation of 51, and you came down another level.  
22 And one of the -- the problems that I've, I guess, got  
23 as I sort of analyzed where we were the last time, and  
24 I'm prepared to write it off to kind of a failure of  
25 advocacy on my part, is that when I look at how other



1 people were sentenced in this case, and what kind of  
2 other considerations the court was willing to give, I am  
3 surprised that Ms. Tankersley fell where she was.

4 I took a look at the average reduction below  
5 government recommendations that you imposed, and I'm  
6 going to set Thurston aside, for everybody other than  
7 Kendall -- Ms. Tankersley, of those people who  
8 cooperated, and the average reduction was 18 months  
9 below the government's recommendation. Some were  
10 higher. Some were lower. But the average was a little  
11 bit -- 18 months below the government's recommendation.

12 THE COURT: You would acknowledge that some of  
13 those sentences were substantially longer?

14 MR. FOREMAN: Oh, absolutely.

15 THE COURT: So 18 months is proportional to the  
16 period of time they were receiving as if -- if you took  
17 it as a factor of --

18 MR. FOREMAN: It -- if you measured it against  
19 the overall sentence that the government recommended,  
20 then I understand how you got to the number. But you  
21 didn't get there in our case. Across the board, you  
22 were generally recommending -- it looked to me like  
23 about 10 percent below the government's number. And the  
24 idea of talking about it in terms of two levels or one  
25 level, I don't care about levels. I care about months.



1 And so from a perspective in terms of how I think about  
2 these things, I need to put that on the table, too.

3 THE COURT: That's why I sent you over to the  
4 book, because you were talking in terms of levels, and I  
5 talk in terms of months. I get to the -- I know the  
6 levels, but I want to know what the months are. So I do  
7 the same thing. But for proportionality, you solve for  
8 X, 181 months --

9 MR. FOREMAN: Eighteen off.

10 THE COURT: -- 18 off is a percentage of what?  
11 51 months, level off, 41 is that -- so you solve for X.

12 MR. FOREMAN: Savoie --

13 THE COURT: You want to do it as a  
14 mathematical -- but you know what, none of this -- we're  
15 going to do the calculations, but, truly, a sentencing,  
16 as I have said over and over again is about  
17 accountability and hope. So I'm not disagreeing with  
18 you on many levels. I understand. And we're here  
19 because the government could have stood by its plea  
20 agreement, just come into court on a straight  
21 sentencing, but the government had the choice, and did  
22 take the choice, to ask for the enhancement.

23 And when the enhancement was then asked for in  
24 the context of this entire group of defendants, you  
25 could only imagine the range of sentencings if there

1 wasn't an acknowledgement and a respected  
2 proportionality of this sentence as between and among  
3 the defendants.

4 MR. FOREMAN: It's not that I don't accept that  
5 there is a relationship between the reductions that you  
6 gave and the length of the sentences that were otherwise  
7 being faced by these people. However, I will say by way  
8 of example that of all of the people who cooperated, we  
9 were the only one who didn't get a two-level reduction.

10 THE COURT: And that's actually one of your  
11 better arguments, and one I was prepared to deal with  
12 today.

13 MR. FOREMAN: Okay. Well, then, I'll leave  
14 that one alone.

15 THE COURT: Okay. Or you might underscore it,  
16 because, very frankly, I'm -- you know, I've looked at  
17 every -- I look at these things, and I've looked at them  
18 all the way through, and I've thought a lot about this  
19 one. And if you could see the notes I have up here, I'm  
20 actually inclined to give her another level. And that's  
21 where I was headed. And the arguments aside, and you  
22 can make them all to the Ninth Circuit, I'm happy to  
23 have you do it, I think they're going to get all ten of  
24 these, they're going to wrestle with them all the way  
25 around, in terms of what the goals of sentencing are,

1 but, frankly, I was prepared to go ahead and do that.  
2 I'm going to tell you that straight up.

3 MR. FOREMAN: Well, I'm going -- you know, I've  
4 taken a lot of time here, and part of it is clearly my  
5 fault in not bringing the case law to your attention  
6 ahead of time, and, again, I apologize for that. But  
7 you've heard the arguments that I have to make.

8 I mean, what I tried to do is I try to find an  
9 intellectually solid place to start. And the argument  
10 that I'm here to make to you is that because of all the  
11 factors I've talked about today, I think the appropriate  
12 sentence for this woman is in the 24- to 30-month range,  
13 which I think is the heartland of charges -- of arson  
14 charges for which we're not dealing with a mandatory  
15 minimum.

16 You've heard the argument, I'm not going to  
17 just restate it over and over again. It's not what I  
18 like to do.

19 The only other thing that I want the court to  
20 be aware of, and I hope you got a hold of, I think it's  
21 Exhibit 101, one of the things that you suggested --

22 THE COURT: No. I read her letter. She has a  
23 copy of the letter that she read -- the letter to --  
24 that she wrote to Jerry Bramwell and copy of the --

25 MR. FOREMAN: Right, good.

1 THE COURT: -- statement that she read in  
2 court.

3 MR. FOREMAN: Exactly.

4 THE COURT: I appreciate that.

5 MR. FOREMAN: I just wanted to make sure  
6 that --

7 THE COURT: And I believe he's still sitting  
8 over there. Who is the --

9 MR. RAY: No.

10 MR. FOREMAN: He left right after his  
11 testimony.

12 MR. ENGDALL: That's Darwin Baker, Your Honor,  
13 FBI.

14 THE COURT: Oh, okay. Because I remember that  
15 Mr. Bramwell sat over in that corner --

16 MR. FOREMAN: That's right.

17 THE COURT: -- but he did leave --

18 MR. FOREMAN: Right after his testimony.

19 THE COURT: -- right after his testimony.

20 MR. FOREMAN: But I don't need to -- I just  
21 want to make sure that you were aware of that, when you  
22 start thinking about where we are and where we've been.

23 I don't have anything more to urge of you  
24 today. And, again, as I said at the start, I thank you  
25 for the opportunity to speak to you.

1 THE COURT: No, you know, I appreciate -- I  
2 would have been appreciative to have your thoughts on  
3 this and the analysis and the thought about the cases or  
4 at this juncture to see what the Seventh Circuit has  
5 done. No, I think people have done really good  
6 lawyering. It would have been nice to have everybody up  
7 to speed, because we all try to get ready and  
8 prepared --

9 MR. FOREMAN: Of course.

10 THE COURT: -- and we want to use our time  
11 wisely.

12 MR. FOREMAN: Of course. Thank you, Your  
13 Honor.

14 THE COURT: Mr. Ray.

15 MR. RAY: Thank you, Your Honor. I appreciate  
16 what the court said. I'm not giving up.

17 THE COURT: But, in fairness, I thought I  
18 better signal where I was headed.

19 MR. RAY: I appreciate that.

20 THE COURT: Uh-huh.

21 MR. RAY: I also want the court to know that  
22 occasionally we, and the court, deal with out-of-  
23 district attorneys, sometimes those experiences are not  
24 always pleasant, and it may simply be a matter of the  
25 person not knowing the practices of this court.

1           In every respect, Mr. Foreman and I have had  
2 nothing but the finest of dealings. He's been  
3 straightforward, completely ethical, and a formidable  
4 advocate, but always a consummate gentleman, and I would  
5 like the court just to know that.

6           THE COURT: I -- that's a given. And I  
7 appreciate it. It would have been just nice to have  
8 that and --

9           MR. RAY: Sure.

10          THE COURT: But at the same time, I was simply  
11 going to take the time to go read it whether -- and I  
12 want to read --

13          MR. RAY: Of course.

14          THE COURT: -- everything. I'd rather read it  
15 before I have to listen to arguments. And if you hadn't  
16 read it and needed the time, I'd rather do it this way.

17          MR. RAY: I appreciate that. I did have the  
18 opportunity to go over it, as did Mr. Engdall. I won't  
19 speak long at all.

20          I just want to respond to two points that  
21 Mr. Foreman raised. The first is the departure  
22 argument, and, in particular, the *Leahy* case out of the  
23 Seventh Circuit, which the court has read. I would --  
24 it's an interesting case. And I have great respect for  
25 that circuit and its holdings. I would point out to the

1 court several things.

2 First, that, of course, it is a Seventh Circuit  
3 and it's not controlling.

4 Second, that the thrust of that case is the  
5 extent of the departure and not the departure itself.  
6 They upheld the departure.

7 Third, unlike Leahy who the court said  
8 threatened to use the toxin, Ms. Tankersley, in this  
9 case, committed the arson.

10 Fourth, Ms. Tankersley, in the attempted arson,  
11 utilized a destructive device, which, had it been  
12 charged, and she had pled to it or been convicted of it,  
13 would have subjected her to 360 months consecutive to  
14 the arson. That takes her out of the heartland that  
15 Mr. Foreman is referring to.

16 And then, finally, it's a pre-*Booker* case.  
17 Post-*Booker*, the court can do whatever it deems  
18 appropriate as long as the sentence is reasonable in  
19 terms of departures. That's all I'm going to say about  
20 that area.

21 I want to respond briefly to the  
22 proportionality argument, which I did -- I chose not to  
23 object, I think, arguably it is beyond the scope of the  
24 limitations placed on this hearing, nevertheless, I will  
25 counter with these bullets.



1 First of all, I'm confident that there is not a  
2 single person that's attended these hearings that would  
3 not say or agree that this court has been remarkably  
4 attentive in all 10 of the sentencing hearings,  
5 actually, 12 if you count Mr. Paul's 2 and  
6 Ms. Tankersley's 2.

7 On May 31st, when this court sentenced  
8 Ms. Tankersley, this court was well aware, of course, of  
9 the previous sentences that it had imposed in the Back-  
10 fire -- against the Backfire defendants, because those  
11 sentences had occurred previous to Ms. Tankersley. It  
12 was also aware of the parties' recommendations to be  
13 made in the subsequent sentencings.

14 On May 31st, and certainly today, the end of  
15 these proceedings, no one knows this case better than  
16 Your Honor.

17 You chose to not follow the government's  
18 recommendation of 51 months, and impose a sentence of  
19 46 months. And you did that for good reason, because in  
20 the previous sentences, you had not followed the  
21 government's recommendation, you had gone below the  
22 government's recommendation in every instance.

23 And in sentencing Ms. Tankersley, you  
24 appropriately considered those cases -- those other  
25 sentences and the proportionality of Ms. Tankersley's

1 sentence in relation to those cases.

2 Mr. Foreman mentions the Thurston sentencing as  
3 a basis for a disproportional argument in  
4 Ms. Tankersley's case. As the court hinted, that's an  
5 apples and oranges argument. Mr. Thurston was a minor  
6 player in a single arson, and his participation was only  
7 involved in the animal release.

8 Mr. Thurston also gave extraordinary  
9 information and very, very valuable information to the  
10 government, which was taken into consideration in  
11 formulating the government's recommendation of  
12 37 months, which is what the court imposed in that case.

13 The two defendants, Backfire defendants, who  
14 are most closely related in terms of culpability are  
15 Ms. Tankersley and Ms. Savoie. The court departed two  
16 levels further in Ms. Savoie's case from the  
17 government's recommendation of 63 months to 51 months,  
18 and in Ms. Tankersley's case departed one level further  
19 from 51 months to 46 months.

20 The slightly lower reduction is entirely  
21 justified on the basis that Ms. Tankersley was involved  
22 in three arsons, not two like Ms. Savoie, on the basis  
23 that Ms. Savoie was -- turned herself in as soon as she  
24 found out that an arrest warrant was out for her. And,  
25 unlike Ms. Savoie, Ms. Tankersley in her early youth,

1 not that long ago, was an outspoken advocate of property  
2 destruction as a form of protest.

3 I understand what the court has said earlier,  
4 and I appreciate that. But the court's imposition of a  
5 46-month sentence in this case, I would submit, was  
6 appropriate, was not disproportionate, afforded  
7 accountability, hope, and should be reimposed. Thank  
8 you.

9 MR. FOREMAN: I'll be honest, I still don't  
10 understand the distinction that he draws with Thurston.  
11 I understand that Thurston was involved in one  
12 substantive offense that was -- and that is a  
13 distinction. On the other hand, as I outlined in my  
14 earlier arguments, it appears to me that he was  
15 associated with the conspiracy for a much longer period  
16 of time, and he performed actions in furtherance of  
17 other arsons having to do with these communiques, I just  
18 don't know how many, at least three or four. So I'm not  
19 sure there is anything to pick between there, to be  
20 honest.

21 But I have appreciated the opportunity to speak  
22 to you today, and I don't have anything more to add.

23 THE COURT: Ms. Tankersley, I know you've read  
24 the presentence report, and I know you've read all the  
25 documents in this case. Have you had plenty of time to

1 talk all of it over with your lawyers?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: And do you have any other additions  
4 or corrections you want to call the court's attention  
5 to?

6 THE DEFENDANT: No, Your Honor.

7 THE COURT: I'd be happy to hear anything else  
8 you want to tell me.

9 THE DEFENDANT: I feel like the statement that  
10 I had prepared and read before comes from my heart and  
11 is how I feel. And I have spoken out in the -- over the  
12 last nine years against this type of actions in my  
13 community and will continue to do so. And you have  
14 that, so I'll just let that statement stand.

15 THE COURT: First, I will accept, and I  
16 appreciate everybody's work on getting the right party  
17 and the right figure for restitution, and it would  
18 appear that the number of \$983,615.19 (sic) apportioned  
19 between Zurich and U.S.F.I. Holdings is the appropriate  
20 designation for the respective restitution amounts.

21 MR. RAY: I think it was --

22 THE COURT: \$100,000 goes to U.S.F.I. Holdings,  
23 and \$883,615.99. We add those up, it's 983,615.99 is  
24 the total.

25 MR. RAY: Right. And just so, I think, in

1 fairness, if the court imposes that restitution in this  
2 case, it probably should go back and change the  
3 restitution figure in Mr. Tubbs' case accordingly. And  
4 the difference is \$6,604.01.

5 THE COURT: Ms. King will be delighted to do  
6 that.

7 And I appreciate -- I guess one of the reasons  
8 I was asking a number of questions is that the defendant  
9 that I just finished with before this case, he was able  
10 to negotiate a substantial, satisfactory result in the  
11 final figure of \$250,000. And it would appear to this  
12 court that that may be a possibility in this case for a  
13 variety of standpoints. And so to the extent that the  
14 court can assist in that or pay attention, I would like  
15 to do that, because, again --

16 MR. FOREMAN: That's certainly our intention,  
17 Your Honor, and we were aware of it as well. And we  
18 just haven't done it yet. And at the point where we  
19 have a proposal to make to the court, we will present it  
20 for your approval.

21 THE COURT: Okay. You know, I'm going to go  
22 through it, I have to make my record as well --

23 MR. FOREMAN: I understand.

24 THE COURT: -- and go through my calculations.  
25 And, trust me, I think we're all looking forward to a

1 day when this isn't the majority topic of our  
2 conversation in our office. But be that as it may, I'm  
3 going to go through what I need to say, and then I'm  
4 going to talk about today, and why today I'm going to do  
5 what I'm going to do.

6 The court agreed to reopen the defendant's  
7 sentencing for the purpose of allowing the defendant the  
8 opportunity to present argument that a 12-level upward  
9 departure was not appropriate.

10 Having given Ms. Tankersley that opportunity,  
11 I'm going to address the arguments as follows:  
12 Essentially, the way I read it, you maintain that the  
13 sentence of 46 months is disproportionately severe when  
14 compared with the sentences received by other  
15 coconspirators.

16 You also assert that other defendants received  
17 a greater reduction from the government's recommended  
18 sentence than Ms. Tankersley, even those who refused to  
19 cooperate fully with the government.

20 Further, you rely on the fact that other  
21 defendants, including those who were convicted of  
22 offenses that were subject to the terrorism enhancement  
23 under 3A1.4 were given greater reductions in their  
24 sentences. And that the suggestion is by the defendant  
25 that an upward departure is not warranted in this case



1 at all.

2 So after reviewing your presentence report, the  
3 sentencing memorandum prior to the sentencing hearing, I  
4 decided, as I did in every other coconspirator's case,  
5 that I would upwardly depart to the offense level that  
6 would have applied if the offenses of conviction had  
7 qualified for the 3A1.4 enhancement.

8 Indeed, I found that it would not be fair or  
9 reasonable if some coconspirators received a 12-level  
10 enhancement under 3A1.4 while others did not simply  
11 because they targeted the conduct of private individuals  
12 rather than government.

13 I think I alluded in the colloquy I had with  
14 counsel that in the context of this particular case, I  
15 think it's an indirect and direct relationship, and  
16 that's just a factor that in attempting to be fair and  
17 provide substantially similar sentences in this  
18 particular case, I have consistently followed as an  
19 analysis. And I'm going to follow it in this case.

20 So the purposes of the conspiracy, the means,  
21 motives, intents, and actions to carry out those  
22 purposes were the same and should be treated similarly.

23 At the same time, I have looked at each  
24 individual case to determine the level of downward  
25 departure, if any. And I have done that as appropriate,



1 again, in each particular case.

2 Further, I have not departed downward more than  
3 two levels in any case, even those defendants who  
4 provided assistance to the government at great cost to  
5 them personally.

6 For those defendants whose offense levels were  
7 significantly greater, such as Mr. Meyerhoff, Mr. Tubbs,  
8 and Ms. Gerlach, a departure of one or two levels  
9 resulted in a proportionately larger reduction in  
10 sentence than for a defendant with a lower offense  
11 level, such as Ms. Tankersley. The departure reflected  
12 the proportionality that is recognized by the  
13 guidelines.

14 As the defendant points out that other  
15 defendants, such as Mr. Tubbs, received only one level  
16 upward departure, I explained the reasoning behind this  
17 decision at Mr. Paul's sentencing on Wednesday, however,  
18 for the benefit of defense counsel who were not present,  
19 I do so again, or for those who have heard it before,  
20 please bear with me.

21 My intent in Mr. Tubbs' case, as in all of  
22 these cases, was to upwardly depart so that the  
23 resulting offense level was the same as if the 3A1.4  
24 enhancement had applied. In Mr. Tubbs' case, I found  
25 that the enhancement applied to some offenses but not to

1 others, including Cavel West, and applied the 12-level  
2 enhancement to each qualifying offense as a Chapter 3  
3 adjustment under the guidelines. I did not impose the  
4 5K2.0 upward departure to each of the nonqualifying  
5 offenses at the same stage of the guideline calculations  
6 because the upward, and I might add the downward,  
7 departures are Chapter 5 adjustments that are intended  
8 to be imposed at the final stages of the guidelines  
9 calculations.

10           Proceeding with the calculations, I determined  
11 the multiple count adjustment for Mr. Tubbs' offenses  
12 under Guideline 3D1.4, also a Chapter 3 adjustment,  
13 which provides a framework for determining the combined  
14 offense level for multiple counts. Under that  
15 framework, the multiple count adjustment is determined  
16 by taking the highest offense level of an offense group  
17 and increasing it by a specified amount. In Mr. Tubbs'  
18 case, the highest grouped offense was 35, reflecting the  
19 12-level enhancement I imposed for Mr. Tubbs' qualifying  
20 offenses under Section 3A1.4. The offense levels of the  
21 remaining groups totaled four units. And under 3D1.4, I  
22 was required to increase the offense level by 4,  
23 resulting in a combined offense level of 39.

24           Had I imposed the 12-level upward departure to  
25 Mr. Tubbs' offenses that did not qualify under 3A1.4 at

1 the Chapter 3 stage of the guidelines calculations,  
2 including the arsons of Cavel West, Childers Meat  
3 Company, Superior Lumber, U.S. Forest Industries, and  
4 the Burns Wild Horse Corral, the grouped offenses with  
5 the highest offense level would have remained 35, but  
6 the offense levels of the remaining groups would have  
7 totaled 8 units, requiring the court to increase  
8 Mr. Tubbs' offense level by 5, resulting in an offense  
9 level of 40.

10           However, because an upward departure under  
11 5K2.0 occurs at the end of the calculations, I imposed a  
12 collective upward departure in Mr. Tubbs' case  
13 accordingly. I did not upward depart 12 levels, because  
14 to do so would have increased Mr. Tubbs' offense level  
15 11 levels beyond what would have resulted in the 3A1.4  
16 enhancement if it had applied to all of his offenses of  
17 conviction.

18           Again, my intent in Mr. Tubbs' case, as in all  
19 the cases, was to upward depart to the offense level  
20 that would have resulted if the 3A1.4 enhancement had  
21 applied. Therefore, I departed upward by one level to  
22 reach offense level 40. The offense level calculations  
23 would have been the same had I applied the upward  
24 departure to each of Mr. Tubbs' nonqualifying offenses  
25 at the Chapter 3 stage of the calculations.

1           Now, unlike Mr. Tubbs, Ms. Tankersley is not  
2 subject to a multiple count adjustment under Guideline  
3 3D1. Therefore, to attain the offense level that would  
4 have applied under a 3A1.4 enhancement, I upward depart  
5 by 12 levels, as I did in several other coconspirators'  
6 sentencings, thus I am not treating Ms. Tankersley more  
7 severely than Mr. Tubbs or any other coconspirator. In  
8 fact, I am treating them the same.

9           Ms. Tankersley also compares her case to  
10 Mr. Thurston who received a 37-month sentence. Notably,  
11 the government's motion for substantial assistance  
12 recommended a sentence of 37 months, and I did not  
13 depart lower than the recommendation, unlike in  
14 Ms. Tankersley's case. And I think it goes without  
15 saying, I'm going -- an aside, Mr. Ray, I think, has  
16 placed on the record an evaluation of the decisions that  
17 really are part and parcel with this entire set of ten  
18 defendants, and that is, they made an individual  
19 determination based on quality and quantity of  
20 information provided by a particular defendant. And the  
21 choice to even have those discussions, and accordingly  
22 made their recommendations to counsel to resolve the  
23 particular case within a range afforded them in a plea  
24 agreement, and as such, as I told you earlier,  
25 oftentimes, the respective attorneys representing the

1 individual parties know a great deal more about the case  
2 and have made evaluations and professional  
3 determinations about what convictions and what risks  
4 they have in pursuing legal theories and issues, and  
5 they make their plea agreements out of a professional  
6 evaluation of that information and those judgment calls.  
7 And as such, I only know that it was a strong  
8 recommendation and a strong statement today that  
9 Mr. Thurston cooperated over and above what the  
10 government might have hoped for. And they, accordingly,  
11 granted him that negotiation at the time of his change  
12 of plea.

13 So I have considered him apples and oranges,  
14 and I have had a difficult time in terms of fashioning  
15 across-the-board proportionality because I do think his  
16 sticks out, but I think the government today has under-  
17 scored why and to what degree that that decision was  
18 made to make that recommendation.

19 So as with other defendants who did not receive  
20 an enhancement under 3A1.4, I upwardly departed by 12  
21 levels in Mr. Thurston's case based on his intent in  
22 targeting the BLM Litchfield Wild Horse Corral for  
23 arson.

24 So I think in listening to your argument, you  
25 also complained that Mr. Thurston did not receive a



1 further upward departure for participating in the U.S.  
2 Forest Industries communique issued after the arson.  
3 However, the 12-level upward departure was not based on  
4 the conduct of composing this communique. It was based  
5 on the conduct of committing the arson.

6 The communique is relevant to the extent that  
7 it reflects the motives and intent of the arsonists who  
8 include Ms. Tankersley. Moreover, I did not impose an  
9 upward departure in any case based on conduct that did  
10 not form the offenses of conviction, and that includes  
11 Ms. Tankersley's uncharged conduct.

12 Thus, today, I think the real issue is whether  
13 the 46-month sentence is reasonable but not greater than  
14 necessary in light of all the facts of this case. And I  
15 find that for the reasons I gave at the initial  
16 sentencing, that I stated on the record, as well as  
17 taking a look at this case in the context of the  
18 defendant's cooperation, her substantial withdrawal from  
19 the activities, her efforts to become a productive and  
20 contributing member of society, her substantial step  
21 towards making amends with the victim in this case, and,  
22 again, when I look back and I collectively and  
23 individually look at each of these cases, across the  
24 board, am I satisfied that it's a fair and reasonable  
25 sentence under all those circumstances, and taking into

1 account each individual defendant's comments,  
2 statements, past actions, changes in behavior, going  
3 forward, the goals of sentencing, be it punishment,  
4 deterrence, rehabilitation, community safety? So I  
5 don't impose these sentences lightly or without a heavy  
6 heart. It is heartbreaking that so many young and  
7 talented and intelligent people will spend years of  
8 their lives, some significantly more than others, behind  
9 bars. But the defendants, including Ms. Tankersley,  
10 made choices and must bear the consequences of their  
11 actions.

12 And like a number of the defendants in this  
13 particular case, I frankly fully expect Ms. Tankersley  
14 to be not only a contributing member while serving her  
15 sentence, and bettering herself, because she certainly  
16 has skills and talents and capabilities that far exceed  
17 individuals, but that she can give back in those  
18 institutions the opportunities that so many people in a  
19 position -- you're in a position that other people would  
20 just cherish the opportunity to have and to go forward  
21 in life. And in so many ways, as I said earlier in  
22 Mr. Paul's sentencing, if they had just part of what you  
23 have been given, a loving family, an education,  
24 substantial economic wherewithal, the opportunities  
25 you've been afforded, many of the people that I see here



1 on a daily basis just wouldn't be in the courtroom. And  
2 some are more resilient than others under the worst of  
3 circumstances, and some who have everything, have no  
4 resiliency, and we see them over and over again. So I  
5 expect, frankly, big things from you.

6 I don't think I'll see you again in the  
7 courtroom. And I think I will hear positive comments  
8 about you while you serve your sentence. And I suspect  
9 when you come out and are on court supervision that you  
10 will be successful, and you will go on and make a huge  
11 contribution to society. I just fully expect that.  
12 Just as I looked at a number of these people who appear  
13 before me, and I suspect they still haven't learned some  
14 lessons, and they will, no doubt, be back in front of  
15 another authority figure. It may not be this court. It  
16 may be somebody else, but I fully expect them to  
17 struggle with decisions they need to make.

18 So, accordingly, I find the following  
19 guidelines calculations apply to this offense:

20 In Case Number 06-60071, count 1 through count  
21 3, conspiracy, arson, and attempted arson of the U.S.  
22 Forest Industries, pursuant to Guideline 3D1.2, count 1  
23 through 3 are grouped together for purposes of  
24 sentencing. The base offense level for this offense is  
25 6, with a 13-level upward adjustment for amount of loss,

1 and 2-level upward adjustment for more than minimal  
2 planning. Based on the recommendations of Probation, I  
3 also find a two-level downward adjustment for minor  
4 role. I decline to adjust downward an additional two  
5 levels for minimal role. In this instance, the  
6 defendant chose to return to the U.S. Industries after  
7 the device did not ignite to ensure that a second arson  
8 attempt was successful.

9 And I want to note and underscore the -- there  
10 by the grace of a decision-making, had the government  
11 chosen to charge you differently, or to pursue an  
12 incendiary device, this would be a very different  
13 sentencing. So that's just a factor I take into account  
14 in terms of all the factors in placing you where you  
15 need to be in this particular calculation.

16 So as I found previously, I do not find the  
17 government has established the offense was calculated to  
18 retaliate against government conduct, therefore, the  
19 base offense level is 19.

20 Now, on the issue of acceptance of  
21 responsibility, the agreement of the parties, you will  
22 receive the three-level downward adjustment for  
23 acceptance of responsibility, resulting in a total  
24 offense level of 16.

25 You have no criminal history points, that means

1 your Criminal History Category is I.

2 Upward departure, 5K2.0, again, I have the  
3 discretion to depart where the guidelines do not  
4 adequately take into account aggravating circumstances  
5 of the offense conduct. As I found before, I find that  
6 3A1.4 does not adequately take into account the  
7 defendant's intent to frighten, intimidate, and coerce  
8 private individuals at the U.S. Forest Industries,  
9 through your actions. I exercise my discretion under  
10 5K2.0 to depart upward by 12 levels, resulting in an  
11 offense level of 28, that resulting offense level that  
12 would have been applied had the enhancement in fact --  
13 terrorism enhancement been applied.

14 Resulting guidelines range based on an offense  
15 level of 28 and a Criminal History Category of I is 78  
16 to 97 months.

17 And, Mr. Ray, your motion.

18 MR. RAY: Consistent with the government's  
19 motion at the previous sentencing hearings, we would  
20 move for a downward departure for substantial assistance  
21 of four levels.

22 THE COURT: And as I indicated again, I have  
23 the -- as I have in all the cases, I have the discretion  
24 to increase the departure for substantial assistance or  
25 depart downward for reasons not taken into account by

1 the guidelines. And I've articulated some of those, and  
2 I would note as follows, and I've stated them before,  
3 but I'll just highlight that you have rendered  
4 extraordinary cooperation with the government. You were  
5 timely. You were truthful. And I also want to  
6 acknowledge that you did remove yourself from the prior  
7 criminal conduct because you became aware of the  
8 consequences, the very, very serious consequences of  
9 your actions. And you have taken enormous steps to walk  
10 a productive and positive direction with tremendous  
11 commitment and success to making a difference through  
12 the health care field. And I think that's to be noted.  
13 And I think that is a clear goal is to deter future  
14 behavior, to provide safety in the community, to give  
15 you a hope through the form of rehabilitation, and the  
16 opportunity to make a difference. And then the  
17 accountability factor is there, and you are going to be  
18 held accountable for your actions.

19 And, again, Ms. Tankersley, it's -- it -- it's  
20 so hard, you know, when I know the Ninth Circuit, when  
21 an appellate court looks at a sentencing record, there  
22 is no question it is a paper record. And to the extent  
23 we go through all the calculations and we think we can  
24 by rule and by mathematics change people's behavior, the  
25 Congress has determined there will be guidelines, and we

1 will make those calculations, and the Supreme Court has  
2 dictated that those calculations will be made, and that  
3 we will, in the framework of trying to provide  
4 reasonable, yet not greater than necessary, sentences,  
5 and that they be fair whether you are sentenced in  
6 Vermont, West Virginia, Montana, or Oregon, to the best  
7 of the ability of the federal judiciary, we try very  
8 hard to do the calculations and meet those expectations  
9 that, I would tell you, are moving targets. And so  
10 we've worked hard, I think, to try to do that.

11 But I would tell you the factors in 3553 that  
12 we've articulated, nature and circumstances of this  
13 offense, your own criminal history characteristics, poor  
14 decision-making, judgment, all those factors as a young  
15 person that you, I know, wish you could take back today,  
16 the goals of sentencing which I articulated, and then  
17 other factors in this case that really give the court a  
18 chance to make a decision, and that is, I've really  
19 watched and looked and tried to understand each one of  
20 you as you come before me in the context of how did --  
21 you know, how did this really work? None of us will  
22 ever truly understand what swept everybody into thinking  
23 this is the way to go, this was the way to create a  
24 change, this was the way to strike back and be heard,  
25 but it strikes me that in this particular instance, you



1 are entitled to two levels -- an additional two levels,  
2 and I'm going to give you those two levels as an  
3 opportunity for you to understand that in the context of  
4 all this, that's where I see you fitting in. I've  
5 struggled with that. I think you and Ms. Savoie are  
6 very, very close, yet different. And I struggled, when  
7 I sentenced you, between trying to do justice to you and  
8 Ms. Savoie, and everyone else, but more clearly tried to  
9 balance that out.

10 But I think on -- the best way I can tell you,  
11 when you sit down and taking -- going so far over here,  
12 when I sat yesterday for four hours in our drug court,  
13 which is really a postprison supervision program for  
14 people coming out, and it's the opportunity to see how  
15 we can help people come back in and make a difference,  
16 and what is needed, and what's necessary, and who's  
17 likely to come back and be successful? I take all that  
18 into account in looking at where you are all going to  
19 end up at some point, and that is back in the community  
20 and moving forward.

21 I want you to be one of the people that we can  
22 turn to in this system and say, you know, I can live  
23 with the fact I was held accountable, because I did make  
24 bad decisions. I did apologize. And I made good on  
25 the -- to the best of my ability -- on restitution.

1 That's important in coming to a point of acceptance and  
2 of forgiveness of yourself and your ability to have  
3 somebody else forgive you. And, finally, for the rest  
4 of your days, as I told Mr. Paul, the legacy that he has  
5 today, that all that he did that didn't even get  
6 counted, he left a legacy of disaster and destruction.

7           You are not -- you have some of that, so you  
8 have a lot to make up on a go-forward basis. And I  
9 believe you, along with a number of the defendants that  
10 I've sentenced in this case, will, in fact, do that. So  
11 to the extent that there is a motivation and an  
12 incentive for you to do that, I hope today gives you  
13 that. I also hope it gives you some closure. And you  
14 can go forward and move beyond this particular point in  
15 your life.

16           So I depart downward two levels for a final  
17 offense level of 22, with an applicable guidelines  
18 range, then, of 41 to 51 months. So I've got to pull  
19 my -- calculate all these additional 3553 factors.

20           So with regard to count 1, you're committed to  
21 the Bureau of Prisons for confinement for a period of  
22 41 months.

23           With regard to counts 2 and 3, you are  
24 committed to the Bureau of Prisons for confinement for a  
25 period of 41 months, to be served concurrently with the



1 sentences imposed on count 1 and each other.

2 You shall pay the full restitution to the  
3 victim identified in the presentence report. And as I  
4 indicated, the total amount is \$983,615.99, interest  
5 shall be waived.

6 Upon release from confinement, you will serve a  
7 three-year term of supervised release, subject to the  
8 standard conditions of supervision adopted by this court  
9 and upon the following special conditions:

10 First, you shall cooperate in the collection of  
11 DNA as directed by your probation officer if required by  
12 law.

13 Next, as indicated, you will pay the full  
14 restitution to the victim identified in the presentence  
15 report in the amount of \$983,615.19 (sic).  
16 Specifically, you shall relinquish any rights to the  
17 \$150,000 bond currently posted with the court. And that  
18 this bond be applied to the restitution. If there is an  
19 unpaid balance at the time of your release from custody,  
20 it shall be paid at the maximum installment possible,  
21 but not less than \$200 per month, or 10 percent of  
22 gross, whichever is greater.

23 And should the matter be resolved, I would  
24 appreciate, again, I'll be notified, and that we will  
25 adjust the judgment accordingly.

1           Next, you're prohibited from incurring new  
2 credit card charges or opening additional lines of  
3 credit without the approval of the Probation Office.

4           Next, you shall authorize release to the US  
5 Probation Office any and all financial information by  
6 execution of a release of financial information form, or  
7 by any other appropriate means as directed by your  
8 probation officer.

9           Next, your employment shall be subject to  
10 approval by your probation officer.

11           You shall disclose all assets, liabilities to  
12 your probation officer. And you shall not transfer,  
13 sell, give away, or otherwise convey any asset with a  
14 fair market value in excess of \$500 without the approval  
15 of your probation officer.

16           Next, you shall have no contact with those  
17 known to be in or having been involved in environmental  
18 or animal rights activism where violence is a means of  
19 their political message. And if there is a concern  
20 about what activities and what groups you can  
21 participate in, please submit that list to the court. I  
22 in no way want anyone to be prohibited from exercising  
23 their right to petition their government for change or  
24 organize on behalf of -- appropriately on behalf of  
25 their passion for the environment, but certainly not to

1 be associating with known -- individuals who advocate  
2 violence as their means of change.

3 And you shall not participate in environmental  
4 or animal rights activism group or groups where, again,  
5 the primary purpose is the use of violence as a means of  
6 changing hearts and minds.

7 I'm not imposing a fine, making the decision  
8 you have no financial resources or appreciable earning  
9 ability to pay beyond the obligations that are  
10 substantial for restitution.

11 You are required to pay a fee assessment in the  
12 amount of \$300.

13 You entered into a plea agreement waiving all  
14 or part of your appeal rights. If you wish to file a  
15 notice of appeal, you may do so. If you cannot afford  
16 to do so, contact the clerk's office, it will be done  
17 for you and done for free.

18 I'm going to ask in a moment about, again,  
19 surrender dates and placement. But I guess I want to  
20 end by stating the following: It's not, again, gone  
21 without notice that your family has been here. And I  
22 know they don't live in this state. And I think that is  
23 a huge, huge support, and comfort to all of us in the  
24 room that you have the ability to have family stand by  
25 you and be there and get you through this. And

1 understand that when people make mistakes, people also  
2 have the right to go back and correct those mistakes,  
3 and go forward. And it's -- there are people who come  
4 into this courtroom and it is an empty chamber. It's  
5 empty. It doesn't matter whether you are rich or poor.  
6 But you have family support. And to the extent that you  
7 have issues that are important to you that they've not  
8 heard, I hope they will accept you for who you are and  
9 appreciate and give you all the guidance and support you  
10 need. And I think that's done without saying. But at  
11 the same time, they need to help support you walking  
12 through this sentence, and at the same time, you need to  
13 give them the benefit of the doubt in terms of --  
14 they've been there for you, and maybe someday down the  
15 road for some other young person, you can indicate to  
16 them that sometimes your parents really are the people  
17 you need to go to when you are having the toughest time,  
18 and maybe they can help you walk through it, and it's  
19 hard on parents to do that, but that's their job.

20 So I think in the bigger scheme of things, you  
21 may be a big help to other people who have lots of  
22 issues that they are not able to take to their family.  
23 Okay.

24 So placements?

25 MR. FOREMAN: Your Honor, we had originally

1 arranged a surrender date for, I think, September 4th.  
2 The proceedings, obviously, are protracted here, and it  
3 may not be a realistic date.

4 I've discussed the matter with the probation  
5 officer. And we've suggested that we -- assuming that  
6 your order goes out and the process begins, we'll see  
7 about the need to adjust it depending upon how long  
8 things take. It's our understanding that everything is  
9 running through Texas now and things are protracted, but  
10 I think, with the court's permission, we come back as  
11 necessary.

12 THE COURT: Yeah, please do. Because I've sent  
13 letters off on, I would say, maybe a third of all the  
14 cases, and already have responses back that they've not  
15 done the placement determinations. And it is taking,  
16 for every single case we have, substantially longer to  
17 get placement out of the consolidated offices of BOP in  
18 Texas. And that's a detriment to the entire system  
19 countrywide, and I think we're all concerned.

20 But in these particular cases, I am watching  
21 carefully. And I think just like any number of the  
22 other defendants that I've strongly stated it would be  
23 a -- it would be wrong to put them in a special unit and  
24 not utilize their ability to educate others, and to  
25 provide some guidance in the general population when

1 they've made a commitment to do that, and have been  
2 successful in a number of them over in the Lane County  
3 jail, that would be a costly and poor decision. And so  
4 at least I want to have them give me their best  
5 explanation.

6 MR. FOREMAN: Thank you, Your Honor.

7 THE COURT: Anything else?

8 MR. FOREMAN: Nothing here.

9 MR. RAY: I hesitate to mention this for the  
10 purpose of 80 cents, but I believe the court said 19  
11 cents and it should be 99 cents at the end of --

12 THE COURT: I might have said 90 cents. I  
13 might have said 99. And I might have -- the last one  
14 said 98. And I will -- it is 99.

15 MR. RAY: Okay.

16 THE COURT: Thank you, Mr. Ray. Thank you very  
17 much.

18 I have appreciated your -- things always look  
19 different in a different jurisdiction. And it's been  
20 always a pleasure to have out-of-circuit counsel here.  
21 And I thank you for your courtesies as well.

22 MR. FOREMAN: Thank you, Your Honor.

23 THE COURT: And I'll tell you, in each case,  
24 I've really appreciated everybody's excellent work, so  
25 thank you.



1 MR. WALKER: Your Honor, excuse me, was the  
2 court going to make a recommendation to the Bureau of  
3 Prisons as far as a facility?

4 MS. LEE: Dublin.

5 MR. FOREMAN: We've asked for Dublin.

6 THE COURT: Dublin, I think, was -- was that  
7 the request earlier?

8 MS. LEE: Yes.

9 MR. FOREMAN: It was, in fact, our request,  
10 Your Honor.

11 THE COURT: Yeah, Dublin, absolutely.

12 MR. WALKER: On September 4th?

13 THE COURT: No. Let's move it out 60 days --  
14 that's from before. Let's move it out 60 days from  
15 today's date, because that's -- it's taken at least  
16 60 days as a date. And then if we're getting close, and  
17 we don't have a designation, I'm going to bump it until  
18 I have a designation.

19 MR. WALKER: Okay.

20 MR. FOREMAN: Thank you, Your Honor.

21 THE COURT: I'm going to offer you this. I am  
22 getting letters on a regular basis from Mr. Meyerhoff.  
23 And I know, if you read the paper, you know that. And I  
24 have found that helpful. I've learned a lot from his  
25 insights on what -- you know, what is available and what

1 is not available. So I have a particular interest in  
2 Dublin should you end up there, along with the other  
3 women's facilities, and so what's available for work and  
4 rehabilitative opportunities in the jail matters -- and  
5 prison matters to me. And to the extent that you can  
6 give me some insight and would care to do that, I would  
7 appreciate it.

8 THE DEFENDANT: Certainly, Your Honor.

9 THE COURT: Thank you.

10 (The proceedings were concluded at 4:33 p.m.)  
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CERTIFICATE

I, Deborah Wilhelm, Certified Shorthand Reporter for the State of Oregon, do hereby certify that I was present at and reported in machine shorthand the oral proceedings had in the above-entitled matter. I hereby certify that the foregoing is a true and correct transcript, to the best of my skill and ability, dated this 5th day of September, 2007.



*Deborah Wilhelm*  
Deborah Wilhelm, RPR  
Certified Shorthand Reporter  
Certificate No. 00-0363